STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM WAYNE COUNTY CIRCUIT COURT

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC., a Michigan non-profit corporation; DETROITERS WORKING FOR ENVIRONMENTAL JUSTICE, a Michigan non-profit corporation; ORIGINAL UNITED CITIZENS OF SOUTHWEST DETROIT, a Michigan non-profit corporation; and SIERRA CLUB, a California corporation,

Petitioners-Appellees,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a Department of the Executive Branch of the State of Michigan; and DAN WYANT, Director of the Michigan Department Of Environmental Quality,

Respondents-Appellees,

v.

AK STEEL CORPORATION, a Delaware corporation,

Intervening Respondent-Appellant.

Supreme Court No.
COA No. 326485
Lower Court No. 14-008887-AA

APPELLANT AK STEEL CORPORATION'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING ORDER APPEALED AND DATE OF ITS ENTRY

AK Steel Corporation ("AK Steel"), the Appellant in the Court of Appeals below, seeks leave to appeal from the July 12, 2016 Order of the Court of Appeals affirming, on other grounds, the Wayne County Circuit Court's denial of AK Steel's motion to dismiss as untimely the petitioners' appeal of respondent Michigan Department of Environmental Quality's ("MDEQ") decision to issue Permit to Install No. 182-05C to AK Steel, and the August 24, 2016 and September 21, 2016 Orders of the Court of Appeals denying the respective motions for reconsideration of AK Steel and MDEQ (cited Orders attached as **Exhibits A-D**).

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the trial court's decision on other grounds, when the Court of Appeals ruled that the contested case provisions of Chapter 4 of the Michigan Administrative Procedures Act ("APA") applied to MDEQ's decision to issue a permit to install to AK Steel, and therefore determined the timeliness of petitioners' claim of appeal using the 60-day appeal period for agency decisions to which the APA applies mandated by MCR 7.119 instead of the 21-day appeal period for other agency decisions mandated by MCR 7.123(B)(1) and MCR 7.104(A)?

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The underlying action in this appeal involves a challenge filed by the petitioner-appellee environmental groups (the "Environmental Groups") to the issuance of a permit by the Michigan Department of Environmental Quality ("MDEQ") to the former Severstal Dearborn, LLC ("Severstal") steel manufacturing plant in Dearborn, Michigan (the "Dearborn Works"). AK Steel purchased Severstal on September 16, 2014 and acquired the Dearborn Works in that transaction. The Dearborn Works is part of Henry Ford's historic Rouge Manufacturing complex. The plant is an integrated steel mill operation that includes sources of air emissions that are regulated by the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the Michigan Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et seq.*, making it subject to pollution control requirements and limits on air emissions.

This application for leave to appeal asks the Court to decide whether the underlying action should be dismissed because the Environmental Groups failed to file their claim of appeal within the time permitted for challenging MDEQ's issuance of the permit. This issue is solely one of law. The only relevant facts are the type of permit at issue and the time within which the Environmental Groups filed their appeal, and these facts are undisputed.

The permit in question is known as Permit to Install ("PTI") 182-05C (the "Permit"), which is the fourth version of a permit[1] that authorized the rebuilding of the facility's Blast Furnace "C" and the installation of large air pollution control devices known as baghouses on several previously uncontrolled sources at the facility (hereinafter "Baghouse Project"). *See* Fact Sheet, Administrative Record ("AR"), Permit File, No. 408. The Baghouse Project resulted in significant reductions in air pollutants. *Id*. The Permit updates certain emissions limits from the

[1] The prior versions of the permit were identified as 182-05, 182-05A and 182-05B.

prior permit, but does not authorize any new physical modifications or changes in the method of operation, which are the triggers for distinguishing this permit update from a new project. *Id.*

The first PTI in the 182-05 permit series was issued in 2006 and the baghouses began initial operation in 2007. *Id.* The permitting process involved the imposition of emission limits on emissions sources that had not previously been subject to limits, as well as on emission points that had not previously existed (i.e., the exhaust stacks for the new baghouses). *Id.* The underlying permitting process involved development of permit limits based on information available at the time, but much of the information used was based on assumptions and on emission factors from tests conducted at other steel plants. *Id.* Ultimately, in post-construction emissions testing, it was determined that certain of the emissions estimates used in the permit process were not representative of actual operating conditions and had underestimated pre-existing (i.e. pre-project) emissions. *Id.* In other words, because the emissions existing before the Baghouse Project were underestimated, the projected emissions on which the emission limits were based were also underestimated. This was true even at sources for which emissions were greatly reduced. The reduction was real, but the starting and end point emissions levels were not accurately identified.

In response to this situation, MDEQ, consistent with its authority under the NREPA, took appropriate action to require Severstal to submit a permit application with updated emissions information to demonstrate that the Baghouse Project – when fully re-evaluated on a pre- and post-project basis using the new and more accurate emissions information from actual site-specific testing – had met the air quality standards applicable to the project at the time it was constructed. The purpose was both to determine if the issuance of the original permit was

supportable given the new emissions testing information, and to establish more appropriate emissions limits for the original project in an updated permit.

After review, MDEQ announced a public comment period, beginning on February 12, 2014 and ending on March 19, 2014, on MDEQ's declared intention to approve the Permit. AR, Permit File, No. 408, p. 6. The public comment period was later extended until March 31, 2014. AR, Permit File, Supplemental No. 432REV, p. 107. MDEQ held a public informational session and a public hearing on March 19, 2014. *Id.* No notice of a contested case hearing under Chapter 4 of the APA was given by MDEQ, and no contested case hearing was held in connection with issuance of the proposed permit to install. Permit to Install 182-05C was issued by MDEQ to AK Steel's predecessor-in-interest Severstal on May 12, 2014. *Id.*, p. 2.

Under the Permit's specific terms, the allowable emissions for the pollutant that the Environmental Groups appear to care the most about, SO2, did not increase. AR, Permit File, No. 408, p. 7. The Permit reallocated allowable SO2 emissions from the blast furnace stove stack to the blast furnace casthouse baghouse stack; the SO2 limit at the stoves was reduced while the limit at the casthouse was increased. However, overall blast furnace SO2 limits *were not increased* for the Permit, and in fact decreased slightly on a pound per hour basis. *Id.*, p. 8. The reallocation was made necessary by unknowns in the original permitting. *See* AR, Permit File, No. 25. The result of this uncertainty was the derivation of an original SO2 limit at the stove stack that was higher than appropriate and an original limit at the casthouse baghouse stack that was lower than appropriate. *Id.*

With respect to other emissions, the combined NO_x limits actually decreased as the result of new tons per year emission limits. AR, Permit File, No. 408, p. 17. The combined lead limits increased by only one tenth of a ton, the combined manganese limits increased by only one half

of a ton, and the combined mercury limits decreased. Fact Sheet, AR, Permit File, No. 408, pp. 5-7. Various combined particulate matter limits increased by a few hundred tons, due mainly to the fact that a portion of the particulate matter, called condensable particulate matter, was not quantified until the facility conducted stack tests.[2] *Id.*, p. 4. These emission limit increases were not due to changes in operations; but instead were adjustments based on better data obtained after installation of new control equipment and additional emissions testing. *Id.*, pp. 1-2.

On July 10, 2014, more than twenty-one days after the issuance of the Permit, the Environmental Groups filed their Claim of Appeal in the Wayne County Circuit Court, asking that the Permit be vacated and the matter remanded back to MDEQ. The Claim of Appeal alleged two bases for jurisdiction, one under NREPA, at MCL § 324.5505(8), and the other under the Revised Judicature Act ("RJA"), at MCL § 600.631. By stipulation of the parties, Severstal was permitted to intervene in this action. On September 16, 2014, Severstal was merged into AK Steel and AK Steel was subsequently substituted for Severstal as the intervening respondent in the circuit court action.

On December 15, 2014, AK Steel filed a Motion to Dismiss for Lack of Jurisdiction in the circuit court, arguing that the jurisdictional basis alleged in the Claim of Appeal under NREPA was inapplicable, and to the extent the RJA provides for jurisdiction, the Claim of Appeal was not timely filed. Specifically, AK Steel argued that the Claim of Appeal was filed more than 21 days after issuance of the Permit and therefore was untimely under MCR 7.123(B)(1) and MCR 7.104(A). As such, the circuit court could not exercise jurisdiction over this appeal, and the appeal should be dismissed.

[2] The combined carbon monoxide limit did increase from 22,151 tons to 39,876 tons, due to the fact that the emission factor relied upon for permitting did not include all stages of the steelmaking operation, thus substantially underestimating emissions. *Id.*

Oral argument on AK Steel's motion was heard by the circuit court on February 12, 2015. The circuit court, ruling from the bench, denied AK Steel's motion, finding that the Claim of Appeal was timely filed because it was filed within 90 days of the issuance of the Permit. The circuit court held that the time for filing the Claim of Appeal was governed by MCL 324.5506(14), which provides for judicial review within 90 days after certain final permit actions. The circuit court's order reflecting this holding was entered on February 25, 2015 (**Exhibit A**).

On March 18, 2015, AK Steel filed an application for leave to appeal the circuit court's order. The court of appeals granted AK Steel's application on August 27, 2015. After AK Steel and the Environmental Groups filed their respective briefs, the court of appeals held oral argument on July 6, 2016.

On July 12, 2016, the court of appeals issued its opinion, holding that the circuit court had erred in applying the 90-day appeal period mandated by NREPA, MCL 324.5506(14), but nonetheless affirming the circuit court on other grounds (**Exhibit B**). The court of appeals based its affirmance on MCL 24.291(1), which states: "When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of [the Michigan Administrative Procedures Act] governing a contested case apply." The court of appeals concluded that the contested case procedures of Chapter 4 of the APA applied in this case, citing the fact that MDEQ's issuance of PTI 182-05C was required to be preceded by public notice and a public hearing. *See* July 12, 2016 Decision, at 7. Because it concluded that the contested case provisions of the APA applied, the court of appeals further held that the governing time period for the filing of the Environmental Groups' Claim of Appeal was the 60-day appeal period mandated by MCR 7.119 for "agency decisions where [the APA] applies." Based on this holding, the court of appeals

rejected AK Steel's argument that the Environmental Groups' claim of appeal was governed by the 21-day appeal period mandated by MCR 7.123(B)(1) and MCR 7.104(A), and affirmed on other grounds the circuit court's denial of AK Steel motion to dismiss.

On August 2, 2016, both AK Steel and MDEQ filed timely motions for reconsideration. On August 24, 2016 and September 21, 2016, the court of appeals denied the motions for reconsideration of AK Steel and MDEQ, respectively (**Exhibits C** and **D**). AK Steel now brings this timely application for leave to appeal to the Michigan Supreme Court.

ARGUMENT

I. This Application for Leave to Appeal raises an issue of significant public interest in a case against a state agency and director of a state agency in his official capacity and it raises a legal principle of major significance to the state's jurisprudence.

In what appears to be an issue of first impression, the court of appeals' ruling stands for the proposition that MCL 24.291(1) makes all "licensing" proceedings in the State of Michigan subject to the contested case provisions of Chapter 4 of the APA whenever the law requires *public* notice and a *public* hearing in connection with the licensing. AK Steel believes that the court of appeals has misconstrued MCL 24.291(1), and that the Legislature only intended for the contested case provisions of Chapter 4 of the APA to apply to licensing proceedings when the law requires the type of *evidentiary* hearing contemplated by the APA's contested case provisions. Because the difference between public hearings and contested case evidentiary hearings is significant, and because the definition of the word "licensing" is a broad one, the holding of the court of appeals will dramatically impact the nature and scope of an array of state agency activities in Michigan unless it is reversed.

The APA defines "licensing" to include any "agency activity involving the grant, denial, renewal suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a

license." MCL 24.205(2). It defines "license" broadly to include "the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law [with certain specific exceptions]." MCL 24.205(1). Thus, under the court of appeals' ruling, the scope of impacted agency activities includes any type of agency approval or permission that is required by law to be accompanied by public notice and a public hearing.

Michigan law provides many instances where public notice and a public hearing are required in connection with what are defined as "licensing" proceedings. For example, with respect to MDEQ, in addition to MCL 324.5511(3) which requires the public hearing at issue here, statutes that require MDEQ to hold a public hearing before issuance of a license or permit include: MCL 324.11125(3) (requiring public hearing before final decision on applications for hazardous waste treatment, storage, or disposal facility operating licenses); MCL 324.11510(2)(c) (requiring public hearing upon proper request before final decision on applications for solid waste disposal area construction permits); MCL 324.30105(8) (requiring public hearing before issuing general permits for certain inland water projects); and MCL 324.63205(7) (requiring public hearing before granting or denying applications for mining permits).

Similarly, other Michigan agencies are required to issue public notice and hold a public hearing in connection with what are defined as "licensing" proceedings. For example, MCL 123.1010 and MCL 123.1012a require a public hearing before the state boundary commission may approve a petition for incorporation or a petition for municipal consolidation. MCL 125.2318 requires a public hearing before the department of licensing and regulatory affairs may grant a variance to requirements of the mobile home code. MCL 125.2455 requires a public hearing before the department of treasury may approve a petition to establish a land reclamation

and improvement authority. MCL 290.709 requires a public hearing before the department of agriculture may issue accreditation of a cooperative association of agricultural producers. Accordingly, the ruling of the court of appeals will impact a diverse variety of state agencies, the regulated community, and the general public in what are broadly defined as "licensing" proceedings under the APA.

The impact on these agencies, the regulated community, and the general public will be significant. There are many important differences between the legal rights and obligations of state agencies, the regulated community, and the public in public hearings as compared to evidentiary hearings governed by Chapter 4 of the APA. Unlike the statutory provisions providing for public hearings, the contested case provisions of Chapter 4 of the APA set forth certain rights to an evidentiary hearing, including: (1) "an opportunity to present evidence and argument on issues of fact" (MCL 24.272(3)); (2) the right to "cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence" (MCL 24.272(3)); (3) the right to "submit rebuttal evidence" (MCL 24.272(4)); (4) the right to have subpoenas issued "requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control" (MCL 24.273); (5) discovery of prior statements and reports authored by agency witnesses and discovery of other agency records (MCL 24.274(2)); (6) application of the rules of evidence as applied in nonjury civil cases in circuit court as far as practicable (MCL 24.275); and (7) findings of fact based exclusively on the evidence and matters officially noted (MCL 24.285). Thus, the ruling of the court of appeals will substantially change the nature of heretofore public hearings that are held in connection with what the APA defines as "licensing" proceedings.

Accordingly, as set forth above, this application for leave to appeal satisfies the grounds of both MCR 7.305(B)(2) and (3). First, the issue raised in this application is one of significant public interest in a case against a state agency and the director of that agency in his official capacity.[3] Both the regulated community and the general public have a significant interest in whether state agencies required by law to hold public hearings in connection with licensing proceedings are subject to the contested case provisions of Chapter 4 of the APA when conducting those hearings. For example, if the contested case provisions are held to apply, members of the public may have their ability to comment at public hearings limited by application of the rules of evidence, *see* MCL 24.275, to say nothing of the significantly greater time, effort, and resources that would be necessary for a member of the public to participate in a contested case hearing. If required to hold contested case evidentiary hearings, agencies may be subjected to significantly increased burdens in many instances where public hearings with less onerous requirements were once the rule. These increased burdens on state agencies may erode their efficiency and slow their ability to conduct licensing proceedings, thereby causing delay and harm to the regulated community in Michigan. AK Steel respectfully submits that this important issue and its impact on the public and the state agencies that serve the public merits a definitive decision by this Court.

Second, for the reasons stated above, the issue raised in this application involves a legal principle of major significance to the state's jurisprudence. Whether MCL 24.291(1) makes the contested case provisions of Chapter 4 of the APA applicable to a broad range of agency licensing proceedings where state law requires a public hearing is a matter of major significance that requires clear resolution. Resolution of this issue will not only guide state agencies, the

[3] Both the state agency MDEQ and its director Dan Wyant, in his official capacity, are named respondents in this action.

regulated community, and the public as to the nature of their legal rights and obligations in connection with these hearings, it will also provide clear guidance concerning important, related collateral issues such as the proper time for the filing of claims of appeal challenging agency licensing decisions, which is the ultimate issue in the present case. It is undeniable that identification of the proper court rule for filing claims of appeal from agency licensing decisions is a legal principle of major significance, because timely filing of a claim of appeal is a jurisdictional prerequisite for review of agency licensing decisions.

II. This Application for Leave to Appeal raises an issue of statutory construction subject to *de novo* review.

The decision of the court of appeals at issue in this application for leave to appeal relates to the court of appeals' construction of MCL 24.291(1). Questions of statutory construction are subject to a *de novo* review. *Speicher v. Columbia Township Bd. of Trustees*, 497 Mich. 125, 133, 860 N.W.2d 51, 55 (2014); *Donajkowski v. Alpena Power Co.*, 460 Mich. 243, 248, 596 N.W.2d 574, 577 (1999).

III. The Court of Appeals erred in ruling that the contested case provisions of Chapter 4 of Michigan's Administrative Procedures Act applied to MDEQ's decision to issue a permit to install to AK Steel.

The court of appeals erred in this case because the *public* hearing required prior to issuance of a permit to install under Michigan's Natural Resources and Environmental Protection Act ("NREPA") is not an *evidentiary* hearing as described by the APA's contested case provisions. When read in context, the phrase "opportunity for hearing" in MCL 24.291(1) does not trigger application of the APA's contested case provisions when only a *public* hearing is required by statute. Absent reversal by this Court, the court of appeals' holding will create a right to contested case evidentiary hearings in a range of agency licensing procedures where only

public hearings have been required to date, upsetting the statutory scheme created by the Legislature.

This erroneous holding was the sole basis that the court of appeals used to determine that the correct time period for the Environmental Groups to file their claim of appeal was the 60-day period of MCR 7.119 for agency decisions where the APA applies. Without this holding, the catch-all provision of MCR 7.123 would apply, allowing only 21 days for appeal, and the trial court's decision denying AK Steel's motion to dismiss the Environmental Groups' untimely claim of appeal for lack of jurisdiction must be reversed.

A. When MCL 24.291(1) is read in harmony with the definition of "contested case" in MCL 24.203(3) it is clear that the APA's contested case provisions only apply when the petitioner is entitled to an *evidentiary* hearing; the type of *public* hearing provided under NREPA for issuance of permits to install is not an evidentiary hearing and therefore the APA's contested case provisions did not apply to MDEQ's decision.

The court of appeals based its decision on MCL 24.291(1), which states: "When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of [the APA] governing a contested case apply." Because the issuance of PTI 182-05C was required to be preceded by public notice and a public hearing,[4] the court of appeals concluded that the contested case provisions of Chapter 4 of the APA applied to MDEQ's decision to issue the Permit. *See* July 12, 2016 Decision, at 7. In reaching this holding, the court of appeals necessarily must have concluded that the phrase "opportunity for hearing" in MCL 24.291(1) meant any type of

[4] MCL 324.5511(3) provides that MDEQ "shall not issue a permit to install . . . for a major source . . . under title I of the clean air act . . . without providing public notice, including offering an opportunity for public comment and a public hearing on the draft permit . . . ."

hearing, including a public hearing, and was not limited to the evidentiary hearings that are a sine qua non of contested case proceedings.[5]

The APA does not define the meaning of the word "hearing." In fact, it clearly recognizes that there are different types of hearings. In MCL 24.203(3), the APA defines "contested case" as "a proceeding, including . . . licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an *evidentiary* hearing." (emphasis added). Separately, the APA uses the term "public hearing" to describe the type of hearing required before an agency adopts a rule. MCL 24.241(1). The APA expressly states that this public hearing "is not subject to the provisions governing a contested case." MCL 24.241(4). Thus, the APA clearly recognizes that some types of hearings are not subject to the APA's contested case provisions.

When reading the phrase "opportunity for hearing" in MCL 24.291(1), the Court must determine what type of hearing is required to trigger the APA's contested case provisions. "[S]tatutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v. City of Lansing*, 486 Mich. 1, 15, 782 N.W.2d 171, 180 (2010) (emphasis in original). "An attempt to segregate any portion or exclude any portion of a statute from consideration is almost certain to distort legislative intent." *Speicher v. Columbia Township Bd. of Trustees*, 497 Mich. 125, 138, 860 N.W.2d 51, 57 (2014). When MCL 24.291(1) and MCL 24.203(3) are read in harmony, the APA's overall statutory scheme makes clear that the APA's contested case provisions apply only when there is an opportunity for

[5] The court of appeals did not appear to be operating under the mistaken assumption that the public hearing held by MDEQ was actually a contested case evidentiary hearing. Instead, the court of appeals noted that a "public hearing" had been held on March 19, 2014. July 12, 2016 Decision, at 7, n. 3. As set forth below, "public hearings" and "contested case hearings" are not the same thing, and there is no support in the record for the notion that the March 19, 2014 public hearing held by MDEQ was actually a contested case evidentiary hearing.

an evidentiary hearing. An opportunity for a public hearing is simply insufficient to convert the licensing process into a APA contested case proceeding.

As set forth above, Chapter 4 of the APA, which contains the provisions related to contested case proceedings, sets forth certain rights and obligations with respect to an evidentiary hearing, including: an opportunity to present evidence and argument on issues of fact, a right to cross-examine witnesses, a right to submit rebuttal evidence, a right to issue subpoenas, discovery from agency witnesses and of agency records, and application of the rules of evidence. *See supra* at p. 8. Conversely, the public hearing required by NREPA prior to MDEQ's issuance of PTI 182-05C was not an evidentiary hearing subject to the APA's contested case procedures. MCL 324.5511(3), which requires an opportunity for a public hearing on a draft permit to install, does not reference the APA or its contested case provisions, and it does not require that the public hearing have any of the indicia of an evidentiary hearing. MCL 324.5516 requires only that the public hearing be conducted by disinterested and technically qualified persons, and that copies of certain information be made available to the public to the extent provided by the Freedom of Information Act, MCL 15.231 to 15.246. Simply put, the public hearing that was required before MDEQ issued PTI 182-05C was not an evidentiary hearing, because NREPA does not require an evidentiary hearing for issuance of permits to install. Indeed, the Environmental Groups appear to have understood this fact, because they did not request an evidentiary hearing in connection with issuance of PTI 182-05C, nor did MDEQ afford them such an opportunity.[6]

[6] As discussed in Section III.B below, MDEQ no doubt understood that it was not empowered to hold a contested case evidentiary hearing on PTI 182-05C under the holding in *Wolverine Power Supply Cooperative, Inc. v. Department of Environmental Quality*, 285 Mich. App. 548, 777 N.W.2d 1 (2009).

There is a clear distinction between the right to a public hearing and the right to an evidentiary hearing under the contested case procedures of the APA. In *Township of Midland v. Michigan State Boundry Commission*, 401 Mich. 641, 259 N.W.2d 326 (1977), this Court distinguished between the right to a public hearing and the right to an evidentiary hearing within the meaning of the APA, holding:

> An annexation proceeding is not a "contested case" even though the Commission must hold a public hearing and representatives of a city, village or township and other persons have a right to be heard at such a hearing before the Commission makes its determination. That procedural right does not create any substantive legal right in a "named party" and, hence, the "legal rights" of a "named party" are not required by the [annexation statutes] to be determined after an opportunity for an evidentiary hearing within the meaning of the Administrative Procedures Act.
>
> The Administrative Procedures Act was designed to provide procedural protection where a personal right, duty or privilege is at stake. Affording the public at large an opportunity to be heard does not create a personal right in the decision . . . .

Id. at 671, 259 N.W.2d at 341.

MCL 24.291(1) does not create a right to any type of hearing on its own terms. In the context of issuance of permits, as opposed to revocation or suspension of an existing permit, a contested case evidentiary hearing is only available when required by another statute. *See Maxwell v. Michigan Department of Environmental Quality*, 264 Mich. App. 567, 572, 692 N.W.2d 68, 72-73 (2004) ("this Court observed that the contested-case provisions of the APA do not apply to the issuance of initial permits by the Department of Natural Resources unless specifically required by statute"), citing *Bois Blanc Island Twp. v. Natural Resources Comm.*, 158 Mich. App. 239, 244, 404 N.W.2d 719 (1987).

Here, the right to a public hearing under NREPA is not equivalent to the right to an evidentiary hearing under the contested case provisions of the APA. MCL 24.291(1)'s reference

to an "opportunity for hearing" should be read in harmony with the definition of "contested case" in MCL 24.203(3) to require an opportunity for an evidentiary hearing as contemplated by the APA's contested case provisions. NREPA's requirement of a public hearing prior to issuance of a permit to install is not the type of "opportunity for hearing" referenced by MCL 24.291(1) and does not make the APA's contested case provisions applicable to MDEQ's decision to issue PTI 182-05C.

B. The Legislature has enacted more specific statutes governing the nature of hearings to be conducted in licensing matters, and the Legislature has clearly distinguished licensing matters where contested case evidentiary hearings are available from licensing matters where only public hearings are available.

The Legislature has demonstrated the ability to clearly differentiate between licensing decisions that are subject to evidentiary hearings under the APA's contested case provisions and licensing decisions that are subject only to non-evidentiary public hearings. For example, NREPA specifically allows owners and operators of existing sources to seek review of the MDEQ's denial of an operating permit, which "shall be conducted pursuant to the contested case and judicial review procedures of the administrative procedures act." MCL 324.5506(14). NREPA does not provide a similar right of review under the APA's contested case provisions for members of the public wishing to challenge the denial or issuance of operating permits or permits to install. Instead, NREPA provides for judicial review of decisions to issue operating or new source permits to install under the Revised Judicature Act, MCL 660.631. *See* MCL 324.5505(8); MCL 324.5506(14). The only hearing afforded members of the public in connection with the issuance of permits to install for new or existing sources is the opportunity for "public comment and a public hearing on the draft permit" before its issuance under MCL 324.5511(3).

The court of appeals has recognized the distinction made by the Legislature between contested case hearings and public hearings in NREPA, and it has ruled that MDEQ lacks the authority to hold contested case hearings where the Legislature has provided only for a public hearing. In *Wolverine Power Supply Cooperative, Inc. v. Department of Environmental Quality*, 285 Mich. App. 548, 777 N.W.2d 1 (2009), the court of appeals held that MDEQ lacked the authority under NREPA to promulgate a rule that allowed contested case hearings for permits to install major sources of air emissions. The court of appeals reviewed MCL 324.5505(8), which specifies that judicial review in the circuit court is the exclusive review procedure for new source permits to install, and MCL 324.5506(14), which specifies that contested case hearings are available to owners or operators of facilities seeking review of the denial of an operating permit. Based on that review, the court of appeals held:

> [W]hen read in combination with the provision for contested case hearings in subsection (14), the omission of contested case hearings in subsection (8) is purposeful. That omission, combined with the Legislature's reference to the "exclusive" means of judicial review, demonstrates to us that the contested case procedure is not available for decisions on *permits to install*.

Id. at 564-65, 777 N.W.2d at 10 (emphasis in original).

Both new and existing source permits to install are subject to the same NREPA requirement that MDEQ hold a public hearing on the draft permit before approving issuance of the final permit. MCL 324.5511(3). Under the holding in *Wolverine Power,* MDEQ's obligation to hold a public hearing before approving a new source permit to install does not convert the permitting decision into a contested case under the APA. Instead, MDEQ is prohibited from applying the APA's contested case provisions to its decision to issue a new source permit to install. The result for an existing source permit to install, which is subject to the exact same public hearing requirement, is no different.

IV. Because the APA's contested case provisions do not apply to MDEQ's decision to issue PTI 182-05C, the claim of appeal filed by the Environmental Groups was untimely and must be dismissed.

In its decision, the court of appeals recognized that in order for the Claim of Appeal filed by the Environmental Groups to be timely under MCR 7.119, the APA must apply to the MDEQ's *decision* to issue PTI 182-05C itself. *See* July 12, 2016 Decision, at 6, n. 2. The court of appeals then held that the APA applied to MDEQ's decision because the issuance of PTI 182-05C was required to be preceded by notice and an opportunity for a hearing, and therefore, "according to MCL 24.291(1), the provisions of the APA that relate to a contested case, i.e., Chapter 4 of the APA, apply." *Id.* at 7. Because, as set forth above, the contested case provisions of the APA do not apply to MDEQ's decision to issue PTI 182-05C, MCR 7.119 does not govern. Instead, the catch-all provision of MCR 7.123 applies, and this case must be dismissed because the Environmental Groups failed to file their Claim of Appeal within 21 days after PTI 182-05C was issued. See MCR 7.123(B)(1) and MCR 7.104(A).

STATEMENT OF RELIEF SOUGHT

AK Steel seeks an order: (1) *reversing* the decision of the court of appeals, (2) *holding* that the contested case provisions of Chapter 4 of the Michigan Administrative Procedures Act did not apply to MDEQ's decision to issue a permit to install to AK Steel, and therefore the 60-day time period for appeal mandated by MCR 7.119 did not apply to the Environmental Groups' Claim of Appeal, and (3) *granting* AK Steel's motion to dismiss for lack of jurisdiction because the Environmental Groups failed to file their Claim of Appeal within 21 days of the MDEQ's decision to issue the subject permit to install as required by MCR 7.123(B)(1) and MCR 7.104(A).

Respectfully submitted,

Dated: October 5, 2016

DRIGGERS, SCHULTZ & HERBST, P.C.

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CERTIFICATE OF SERVICE

I certify that on October 5, 2016, I filed the foregoing paper with the Clerk of the Court using the Truefiling system which will electronically send notification to all counsel of record.

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